IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

SYLVANIUS O. FURLOW,

        Plaintiff-Petitioner,

        vs.

ERNIE MOORE, WARDEN,

        Defendant-Respondent.

    :
    :
    :   Case No. 3:06cv108
    :
    :   JUDGE WALTER HERBERT RICE
    :

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE (DOC. #17) IN THEIR
ENTIRETY, AS SUPPLEMENTED HEREIN; PLAINTIFF-PETITIONER'S
OBJECTIONS TO SAID JUDICIAL FILING (DOC. #18) OVERRULED;
JUDGMENT TO ENTER IN FAVOR OF DEFENDANT-RESPONDENT AND
AGAINST PLAINTIFF-PETITIONER, DISMISSING PETITION FOR WRIT OF
HABEAS CORPUS AS PROCEDURALLY BARRED; TERMINATION ENTRY

Pursuant to the reasoning and citations of authority set forth by the United

States Magistrate Judge, in his Report and Recommendations filed January 25,

2007 (Doc. #17), and this Court's reasoning set forth below, as well as upon a

thorough *de novo* review of this Court's file and the applicable law, said Report

and Recommendations, as supplemented herein, are adopted in their entirety. The

Plaintiff-Petitioner's Objections to said judicial filing (Doc. #18) are overruled.

Judgment will be ordered entered in favor of Defendant-Respondent and against

Plaintiff-Petitioner, dismissing the Plaintiff-Petitioner's Petition for Writ of Habeas

Corpus, upon its merits, as procedurally defaulted.

The Magistrate Judge predicated his procedural default analysis on the

conclusion that the refusal of the Ohio Supreme Court to grant him leave to file a

delayed appeal constituted an adequate and independent state ground for denying

him the relief he seeks in this matter. The conclusion of the Magistrate Judge in

that regard is unquestionably correct. *See e.g.*, *Smith v. State of Ohio Dept. of*

Rehabilitation, 463 F.3d 426, 430-32 (6th Cir. 2006). In addition, Judge Merz

rejected Plaintiff-Petitioner's assertion that his procedural default was excused as a

result of the failure of his appellate counsel to provide him a copy of the decision

of the Clark County Court of Appeals affirming his conviction and sentence, given

that the Plaintiff-Petitioner had failed to seek leave to appeal that decision to the

Ohio Supreme Court within 45 days of receiving a copy of same. *Smith*, like this

litigation, raised the identical issue of procedural default as a result of the

petitioner's failure to file an appeal with the Ohio Supreme Court within 45 days of

the decision by the state court of appeals. Therein, the petitioner similarly argued

that his procedural default was excused, because of the failure of his appellate

counsel to provide him a copy of the state appellate court's decision. The Sixth

Circuit held that the petitioner's default was not excused, given that he had not

sought leave to file a delayed appeal with the Ohio Supreme Court within 45 days

of receiving the appellate court's decision. Id. at 435-36. In accordance with

Smith, therefore, this Court concludes that the failure of Plaintiff-Petitioner's appellate counsel to furnish him with a copy of the decision of the Clark County Court of Appeals, affirming his conviction and sentence, does not excuse his procedural default herein, given his failure to seek leave to file a delayed appeal in the Ohio Supreme Court within 45 days of the receipt of the appellate court's decision.

Given that the Court's decision herein would not be debatable among jurists of reason, and that Plaintiff-Petitioner has failed to make a substantial showing of the denial of a constitutional right, this Court denies a Certificate of Appealability and, given that any appeal herefrom would be <u>objectively</u> frivolous, this Court likewise denies any anticipated motion for leave to appeal *in forma pauperis*.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

/s/ Walter Herbert Rice

February 4, 2008

WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

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Copies to:

Sylvanius O. Furlow, Pro Se

Chief Magistrate Judge Michael R. Merz